Reserved Judgment

Assessment Years 1989-90 & 1990-91

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

(1) Income Tax Appeal No. 165 of 2001

Sedco Forex International Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. G. Castelli
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

WITH

(2) Income Tax Appeal No. 163 of 2001

Sedco Forex International Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. C. Gameison
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(3) Income Tax Appeal No. 164 of 2001

Sedco Forex International Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. G. Fortune
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(4) Income Tax Appeal No. 166 of 2001

Sedco Forex International Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. H. Mulder
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(5) <u>Income Tax Appeal No. 168 of 2001</u>

Sedco Forex International Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. W. Jonston
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(6) <u>Income Tax Appeal No. 169 of 2001</u>

Sedco Forex International Drilling Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. F. Defaux
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(7) <u>Income Tax Appeal No. 170 of 2001</u>

Sedco Forex International Drilling Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. J. Marchandon
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(8) <u>Income Tax Appeal No. 171 of 2001</u>

Sedco Forex International Drilling Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. W. Nolan
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(9) Income Tax Appeal No. 172 of 2001

Sedco Forex International Drilling Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. R. Laveirgne
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(10) Income Tax Appeal No. 174 of 2001

Sedco Forex International Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. M. Jolivet
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(11) Income Tax Appeal No. 175 of 2001

Sedco Forex International Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. J.J. Dibon
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(12) Income Tax Appeal No. 176 of 2001

Sedco Forex International Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. F. Bonneau
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(13) Income Tax Appeal No. 177 of 2001

Sedco Forex International Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. J. Germonpre
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(14) Income Tax Appeal No. 178 of 2001

Sedco Forex International Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. P. Journez
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(15) Income Tax Appeal No. 179 of 2001

Sedco Forex International Drilling Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. R.R. Castaing
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(16) Income Tax Appeal No. 180 of 2001

Sedco Forex International Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. M. Timms
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(17) <u>Income Tax Appeal No. 181 of 2001</u>

Sedco Forex International Drilling Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. A. Helin
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(18) <u>Income Tax Appeal No. 183 of 2001</u>

Sedco Forex International Drilling Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. S.J. Burnett
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(19) <u>Income Tax Appeal No. 184 of 2001</u>

Sedco Forex International Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. D. Vigneau
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(20) <u>Income Tax Appeal No. 186 of 2001</u>

Sedco Forex International Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. P. Journez
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(21) <u>Income Tax Appeal No. 188 of 2001</u>

Sedco Forex International Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. D. Vigneau
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(22) <u>Income Tax Appeal No. 189 of 2001</u>

Sedco Forex International Drilling Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. A. Bruce
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(23) <u>Income Tax Appeal No. 190 of 2001</u>

Sedco Forex International Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. P. Ropert
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(24) <u>Income Tax Appeal No. 192 of 2001</u>

Sedco Forex International Drilling Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. J. Sillard
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(25) <u>Income Tax Appeal No. 193 of 2001</u>

Sedco Forex International Drilling Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. J. Molada
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(26) <u>Income Tax Appeal No. 195 of 2001</u>

Sedco Forex International Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. R. Forget
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(27) <u>Income Tax Appeal No. 196 of 2001</u>

Sedco Forex International Drilling Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. P. Avelin
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(28) <u>Income Tax Appeal No. 197 of 2001</u>

Sedco Forex International Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. G. Payrau
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(29) <u>Income Tax Appeal No. 198 of 2001</u>

Sedco Forex International Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. G. Bouthe
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(30) <u>Income Tax Appeal No. 200 of 2001</u>

Sedco Forex International Drilling Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. T. Tarasoff
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(31) <u>Income Tax Appeal No. 553 of 2001</u>

Sedco Forex International Drilling Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. A. Dromard
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(32) <u>Income Tax Appeal No. 554 of 2001</u>

Sedco Forex International Drilling Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. R. Grey
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(33) Income Tax Appeal No. 555 of 2001

Sedco Forex International Drilling Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. A. Bruce
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(34) Income Tax Appeal No. 556 of 2001

Sedco Forex International Drilling Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. N.J. Hovell
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

(35) Income Tax Appeal No. 557 of 2001

Sedco Forex International Drilling Inc. (Formerly known
as Forex Neptune International Inc.)
as agent of its employer Mr. R. Danzin
…… Appellant

Versus

The commissioner of Income-tax
Dehradun and another …….. Respondents

Mr. Porus Kaka, Advocate assisted by Mrs. T. Punwani, Adv.
and Mr. Arvind Vashishth, learned counsel for the appellants.
Mr. S.K. Posti, learned counsel for the respondents.

Coram : Hon'ble P.C. Verma, J.
Hon'ble P. C. Pant, J.

[Per Hon'ble P.C. Verma, J.]

These appeals, preferred under Section 260A of the Income Tax Act, 1961, are directed against the consolidated judgment and order dated 20th April, 2000 passed by the

Income Tax Appellate Tribunal, New Delhi to the extent it disallows the claim in respect of exemption from double taxation of the appellants for the assessment years 1989-90 and 1990-91.

2) These appeals have been filed by Sedco Forex International Incorporation and Sedco Forex International Drilling Incorporation, as agents of their employees.

3) The appellants are non-resident foreign citizens employed by Sedco Forex International Inc. (for brevity, hereinafter SFII) and by Sedco Forex International Drilling Incorporation (for brevity hereinafter SFIDI). Both the companies are incorporated in the Republic of Panama. Both these companies have entered into contract with Oil and Natural Gas Corporation Ltd. (ONGC) for drilling operations in offshore areas of India within its exclusive economic zone. The appellants are residents of France, U.K, etc. These countries have entered into International treaty with India, known as Agreement for Avoidance of Double Taxation **(AADT)** which have a clause for avoidance of Double Taxation. Appellants are non-resident of Republic of India. All these appellants are resident of France, U.K. and other States with which India has entered into International treaty which contains a clause for avoidance of double taxation. In similar terms and conditions we take up treaty of India with U.K. However, a short point involved in all the aforementioned appeals relates to interpretation of Article 16 of the Agreement for Avoidance of Double Taxation between the India and U.K. and clause 14 of France agreement. It also involves the question of presumptive taxation under section **44BB** of the Income Tax Act. The assessee is a non-resident. In the circumstances, the questions raised by the assessee-appellant in the memo of appeal are five in number which are in substance reformulated in two. We will

have to answer these two questions finally as far as this Court is concerned.

4) The questions raised before us for decision are as follows:

> *1. "Whether, the learned I.T.A.T. has erred in law in holding that the appellants have failed to satisfy the condition that 'the remuneration is not deductible in computing the profits of an enterprise chargeable to tax in that other State'?"*
>
> *2. "Whether, the learned I.T.A.T. has erred in law in holding that the appellants are not governed by the provisions of the Agreement for Avoidance of Double Taxation (AADT)?"*

5) We have heard Sri Porus Kaka, learned counsel for the appellants who came from Bombay and Sri S.K. Posti, learned counsel for the respondents and have perused the judgment of the Assessing Authority and the Income Tax Appellate Tribunal.

Answer to question Nos. 1 and 2:

6) Section **44 BB** of the Income Tax Act was inserted by the Finance Act, 1987, w.e.f. 1.4.1983 which is reproduced as under:-

> ***"44BB.*** *(1) Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee, being a non resident, engaged in the business of providing services or facilities in connection with, or supplying plant and machinery or hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils, a sum equal to ten per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and*

gains of such business chargeable to tax under the head "Profits and gains of business or profession :

***Provided** that this sub-section shall not apply in a case where the provisions of section 42 or Section 44D or section 115A or section 293A apply for the purposes of computing profits or gains or any other income referred to in those sections.*

(2) The amounts referred to in sub-section (1) shall be the following namely:-

(a) the amount paid or payable (whether in or out of India) to the assess or to any person on his behalf on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India; and

(b) the amount received or deemed to be received in India by or on behalf of the assessee on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of mineral oils outside India.

The following sub-section (3) shall be inserted after sub-section (2) of section 44BB by the Finance Act, 2003, w.e.f. 1.4.2004:

(3) Notwithstanding anything contained in sub-section (1), an assessee may claim lower profits and gains than the profits and gains specified in that sub-section, if he keeps and maintains such books of account and other documents as required under sub-section (2) of section 44AA and gets his accounts audited and furnishes a report of such audit as required under section 44BB, and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee under sub-section (3) of section 143 and determine the sum payable by, or refundable to, the assess.

Explanation.-For the purposes of this section,-

(i) *"plant" includes ships, aircraft, vehicles, drilling units, scientific apparatus and equipment, used for the purposes of the said business;*

(ii) *"mineral oil" includes petroleum and natural gas."*

From perusal of the section it is clear that for an assessee, being non-resident, a sum equal to ten per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".

The "assessee" as has been defined in clause 7 of Sec. 2 means a person by whom or any other sum of money is payable under this Act.

The "person" is defined in clause 31 of Sec.2 which includes 'an individual',

Clause 24 of Sec. 2 defines "income" includes- profits and gains.

7) Reading of these provisions together makes manifestly clear that a non-resident person engaged in the business of providing service is an assessee and sum equal to ten per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains which shall be income for the purpose of chargeable of tax under the head "profits and gains of business or profession". Thus, unequivocally the appellants are chargeable to income tax in view of the aforesaid provision.

8) Chapter IX of the Income Tax Act provides for double taxation relief. Section 90 (1) under the said Chapter reads as under:-

"90. [(1)] The Central Government may enter into an agreement with the Government of any country outside India-

(a) for the granting of relief in respect of income of which have been paid both income-tax under this Act and income-tax in that country, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country, or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or. Under the corresponding law in force in that country, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under this Act and under the corresponding law in force in that country,

and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement".

9) The Government of Republic of India has entered into an agreement with Government of France, Government of United Kingdom of Great Britain & Northern Ierland, Government of Canada, Government of U.S.A. and Government of Itlay, of which the appellants are residents, which has been notified under Sec. 90. A perusal of the entire agreements shows that the provision has been made in terms of the language of Sec. 90. There are separate Agreements with aforesaid countries. There is also no doubt that the Agreement for Avoidance of Double Taxation (AADT), which is an international Treaty, overrides the provisions of the Income Tax Act, 1961.

10) The relevant Article in the Agreements relating to "dependent personal services" is almost common in both the Agreements (in the Agreement with the United Kingdom it is Article 16, in the Agreement with France it is Article 14). Sub Clause (2) of the Article relating to dependent personal services mentioned in the aforesaid Agreements is being reproduced below:-

"2. Notwithstanding the provisions of paragraph 1 of this Article, remuneration derived by a resident of a Contracting State in respect of an employment exercised in other Contracting State shall not be taxed in that other State, if:

(a) He is present in that other State for a period not exceeding in the aggregate 183 days during the relevant fiscal year;

(b) The remuneration is paid by, or on behalf of, the employer who is not a resident of that other State; and

(c) The remuneration is not deductible in computing the profits of an enterprise chargeable in that other State?"

From perusal of clause (2) of AADT, it is clear that the benefit of this clause can only be available when all the conditions contained in sub-clause (a), (b) and (c) are fulfilled as all these three conditions are mutually inclusive and of inconformity of Sec. 90 quoted above. To avail the benefit of this clause it has to be shown by the assessee that in corresponding State with which India has entered into treaty there is a corresponding provision of income tax and assessee is liable to tax under the corresponding law of that country and he has actually paid the tax there only then the benefit of clause (2) of Article 14 shall be available.

11) Admittedly, appellants are non-residents employees, employed by the SFII and SFIDI (both are Panamanian companies), who are in receipt of remuneration in connection with the employment in India on foreign ship.

12) There is no dispute that the total stay in India by the assessee (appellants) does not exceed 183 days during each of the year under consideration. But, it is also not disputed that

all the three requirements mentioned in Clauses (a), (b) and (c), as quoted above, are required to be fulfilled together i.e. the conditions are cumulative (mutually inclusive). In other words, non-fulfillment of even a single condition would disentitle the benefit of AADT. As to the second condition i.e. Clause (b) mentioned above, it must be established that the remuneration is paid by or on behalf of employer who is not a resident of that other State. Both the companies namely, SFII and SFIDI, the employer are neither a resident of India nor the resident of 'other State' (i.e. U.K., France, Canada, U.S.A., Italy). The said employer is resident of Panama. As such, condition as required under Clause (b) also gets fulfilled.

13) The main controversy between the parties is regarding the non-fulfillment of condition as mentioned in Clause (c) quoted above i.e. remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall not be taxed in that other State only if, he further establishes that the remuneration is not deductible in computing the profits chargeable to tax in his State. The simple meaning of said condition is that the assessee has to show in India that the remuneration received by him is chargeable to tax in other Contracting State of which he is resident. The Assessing authorities and the Appellate authority have found that the appellants failed to show that the remuneration received by them for services rendered in India was chargeable to tax in their State (the other Contracting State of which they are resident). Even before this Court, on behalf of the appellants, it could not be shown if the amount received by them was chargeable to tax in their State (i.e. the other Contracting State in the Agreement). As such, we see no error of law in the impugned assessment orders and the orders passed by the appellate authority or the Income Tax Appellate Tribunal that the assessee did not fulfil the third condition as required

under Clause (c) of the aforesaid article under AADT and, therefore, was not entitled to the benefit of Sub Clause 2 of Article on dependent personal services mentioned in the AADT.

14) On behalf of the appellants our attention was drawn to the principle of law laid down in Union of India Vs. Azadi Bachao Andolan reported in (2003) Vol. 263-ITR-707. In said case, it has been held that no provision of the double taxation Avoidance Agreement can possibly fasten a tax liability where the liability is not imposed by the Act. If a tax liability is imposed by the Act, the Agreement may be resorted to for negativing or reducing it; and, in a case of difference between the provisions of the Act and the Agreement, the provisions of the Agreement would prevail. We have gone through said case law. However, on the basis of said case law, assessee cannot claim benefit of AADT unless he fulfills the conditions that he is covered under the Agreement. Learned counsel for the appellants argued that 'liability of taxation' should not be misunderstood with 'payment of tax'. It is further argued that liability of tax is a legal situation and payment of tax is a fiscal fact. Therefore, it is submitted on behalf of the appellants that merely for the reason that a particular income is exempted in the other Contracting State does not make it a case that it is not chargeable to tax in such other State. We do agree with the submission to the extent that "chargeable of tax" does not necessarily mean that the tax is paid on the income and it could be an amount which is exempted from the tax in that State. But what appellants in the present case are lacking is that they have not furnished any document or statute that the amount they have received through SFII and SFIDI for their work in India is chargeable to tax in their State. In the case of Union of India Vs. Azadi Bachao Andolan (supra) it is held that an assessee, who has shown

exemption from tax under Mauritian law, from payment of tax, can claim benefit of Indo-Mauritius Agreement for Avoidance of Double Taxation. But in the present case, appellants have not shown any document or statute that the remuneration received by them, exempted or otherwise, was chargeable to tax in their State which was a Contracting party to AADT.

15) Section 44BB contains special provision for computing profits and gains in connection with business of exploration etc. of mineral oils. Under said Section, in the case of an assessee being non-resident engaged in the business of providing services or facilities in connection with or supplying plants and machines on hire use or to be used in the prospecting of or extraction or production of mineral oils, a sum equal to 10% of the aggregate of the amounts specified shall be deemed to be the profits and gains of such business chargeable to tax under the head "profits and gains of business or profession'. Under said Section, deemed profits to the tune of 10% are taxed and it overrides the other charging sections in this regard. It is also clear that it applies to non-resident assessee and tax authorities appear to have rightly assessed the appellants income under the aforesaid Section. However, Mr. Porus Kaka, learned counsel appearing on behalf of appellants drew attention of this Court to Article III in aforesaid AADT with the France and argued that the appellants cannot be subjected to tax as they have no permanent establishment in India. Article III of AADT with France, reads as under:

> *"The industrial or commercial profits (excluding the profits derived from the operation of ships or aircraft) of an enterprise of one of the Contracting States shall not be subjected to tax in the other Contracting State unless the enterprise has a permanent establishment situated in that other Contracting State. If it has such a permanent*

establishment the profits attributable thereto shall be subjected to tax only in that other Contracting State."

In view of said language, it is clear that the exemption given under aforesaid Article in the Agreement with France relates to the enterprise of one of the Contracting State and not to the Panamanian Company (which is not a Contracting State). Therefore, we are unable to see force in aforesaid contention for the reason that SFII or SFIDI has no permanent establishment in India and in our considered opinion the Income Tax Appellate Tribunal has not erred in law in holding that the appellants are not entitled to the benefit under the AADT.

16) Lastly, it is also contended on behalf of the appellants that the tax exemptions under the Agreement of Avoidance of Double Taxation with the various States are executed to encourage investment by the foreign companies in developing countries. And for that reason treaty shopping should neither be treated unethical nor illegal. We are aware of the fact that 'Treaty Shopping' is an act of resident of a third country taking advantage of a fiscal treaty between the two countries. We also agree that certain developing countries do enter into agreement for avoidance of double taxation, in which one of the motive is to encourage foreign investment or to boost the economy. However, unless the conditions as required under AADT are fulfilled, assessee cannot claim benefit of the same.

17) For the reasons as discussed above, both the questions are answered in negative i.e. in favour of the Department and against the appellants.

18) Accordingly, the appeals are dismissed. No order as to costs.

(P. C. Pant, J.) **(P.C. Verma, J.)**

Dt. 22 July, 2005.
H. Negi